

March 6, 2006

Charter school not eligible for virtual transportation funding

A charter school in north central Idaho is not eligible for special virtual charter school transportation funding, the State Department of Education announced today.

The department notified the Idaho Distance Education Academy (IDEA) of the decision today, after receiving legal guidance from the Office of the Idaho Attorney General. The decision means the on-line program is not eligible and will not receive about \$341,000 in school transportation funding. The decision does not affect the more than \$4 million in state funds IDEA is expected to receive for teacher salaries and operating funds this year.

In 2004, the Legislature modified the state's school transportation program to allow virtual charter schools and virtual home-based charter schools to receive school transportation funding to offset the costs of on-line delivery of instruction to individual children's homes. In the fall IDEA, which is chartered by the Whitepine School District in Deary, sought state reimbursement for on-line expenses.

IDEA officials told the department that the parents deliver instruction to students at home and consult with school staff via email, qualifying IDEA for "virtual school" status. After reviewing the information submitted by IDEA, Superintendent of Public Instruction Marilyn Howard asked for legal guidance from the Office of the Idaho Attorney General to help the department determine whether the program met the state's definition of a virtual school.

The March 3 response indicated under the current virtual school definition, IDEA appears not to meet the intent of the Legislature:

"... if IDEA is doing little more than assisting parents in purchasing curriculum materials and tracking progress, it is unlikely that a court will find it meets the definition of a public virtual school or of any school to be supported with public funds."

The response also noted that the state's definition of a virtual school appeared to be incomplete: "We need the legislature to clarify its intent by describing some minimum required standards for delivery of instruction by a virtual school. For example, the legislature should clarify how much a public virtual school can rely on a parent to provide instruction to the student and still qualify as a virtual school."

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(Editors and reporters: A copy of this news release and the March 3 letter is available on the department's website: www.sde.state.id.us/dept under "What's New.")



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

March 3, 2006

VIA HAND DELIVERY

The Honorable Marilyn Howard
Superintendent of Public Instruction
Idaho Department of Education
650 West State Street
Boise, Idaho

Re: Our File No. 2006STA007
Definition of Public Virtual School

Dear Dr. Howard:

You have asked for legal guidance regarding the interpretation of the definition of "public virtual school" as set forth in Idaho Code § 33-5202A(6), and the definition of "home-based public virtual school", as that phrase is used in Idaho Code § 33-1006(7).

As I understand your concern, the interpretation of those definitions affects payments made to public virtual schools pursuant to Idaho Code § 33-1006(7), which addresses transportation cost reimbursement, and Idaho Code § 33-5208(8), which relates to funding for public virtual schools from the state educational support program. Of particular concern to you is the current request of the Idaho Distance Education Academy ("IDEA") for transportation reimbursement money pursuant to Idaho Code § 33-1006(7).

You have indicated that, under its program, IDEA provides a contact teacher who assists the parents in developing an Individual Learning Plan ("ILP") for their child. Once the plan is approved, the parents select curriculum materials ordered through the IDEA website, and the parents provide the instruction under the selected curriculum. It is the parents who assess the child's progress and then inform IDEA of that progress. The parents receive a monthly contact by telephone or e-mail from the contact teacher and are to check their e-mail once a week (but preferably daily) for any communication from the IDEA contact teacher.

CONCLUSION

Given the fact that there appears to be no instruction provided by a certificated teacher directly to pupils and very little interaction, if any, between a certificated teacher and pupils, a court would most likely determine that IDEA does not meet the definition of a "public virtual school" or a "home-based public virtual school." However, with respect to your request for more general guidance, without more guidance from the legislature as to the definition of a "public virtual school" in terms of actual "contact time" or interaction with a certificated teacher, it is not possible to determine legislative intent with any degree of specificity. We need the legislature to clarify its intent by describing some minimum required standards for delivery of instruction by a virtual school. For example, the legislature should clarify how much a public virtual school can rely on a parent to provide instruction to the student and still qualify as a virtual school. If the legislature wishes to fund a program such as you have described for IDEA, then more clearly established minimum standards for delivery of instruction by a public virtual school should encompass this program.

ANALYSIS

The definition of a "public virtual school" is found in Idaho Code § 33-5202A(6):

"Public virtual school" means a public charter school that may serve students in more than one (1) school district and through which the primary method for the delivery of instruction to all of its pupils is through virtual distance learning or online technologies.

"Legislative definitions of terms included within a statute control and dictate the meaning of those terms as used in the statute." White v. Mock, 140 Idaho 882, 104 P.3d 356 (2004). A court would follow the normal process of statutory interpretation, which process "always begins with an examination of the words of the statute." Johnson v. Boundary School Dist. No. 101, 138 Idaho 331, 335, 63 P.3d 457, 461 (2003) (citing In re Permit No. 36-7200, 121 Idaho 819, 822, 828 P.2d 848, 851 (1992)). There exists no Idaho case law interpreting the statutory definition found at Idaho Code § 33-5202A(6).

The definition of a public virtual school calls for the school to deliver instruction through virtual distance learning or online technologies. Delivery of instruction clearly contemplates some type of interaction or contact between the school, presumably via its teachers, and its pupils. For that reason, we believe a court would find that IDEA does not meet the definition, as IDEA apparently provides no contact in terms of instruction between its teachers and its pupils and very little, if any, interaction between teachers and pupils.

However, to what extent the legislature contemplates such interaction and contact must occur in order to meet the definition cannot be ascertained from the language provided in the statute. The complete spectrum of potential interpretations of the definition can reasonably extend from IDEA at one end, where the parents appear to provide all of the individual instruction, and at the other end by a program such as the Idaho Digital Learning Academy, which provides online courses by certificated teachers. The problem with the current definition is that it is not clear where the legislature intended to draw the line regarding teacher-pupil interaction via the Internet and what other minimum requirements for delivery of instruction, if any, are required in order to meet the definition.

The legislature has defined a "traditional public school" simply as "any school existing or to be built that is operated and controlled by a school district in this state." Idaho Code § 33-5202(7). The legislature has not defined what it means by a "charter school", except to say that a "public charter school" is "a school that is authorized under this chapter to deliver public education in Idaho." Idaho Code § 33-5202(6). Neither of those definitions explains what the legislature believes to be the definition of the term "school" as it relates to teacher-pupil contact or interaction.

A basic problem in determining the intent of the legislature in defining "public virtual school" is the lack of any clear definition of a "school" in general. No meaningful definition of "school" exists in the Idaho Code. For a brief time, the Idaho Code did define "school" as follows:

School shall mean a group comprising more than one school building, or a separate school building, or a unit of several grades in any one building, whenever such unit is the basis for computing classroom units according to the provisions of sections 33-1006 through 33-1007 as amended.

Idaho Code § 33-1005(g) (1960). That definition was enacted during the 1959 legislature and deleted by amendment by the 1961 legislature.

For purposes of discontinuing a school pursuant to Idaho Code § 33-511.3, the Idaho Supreme Court defined the term "school" as follows:

The noun "school" is subject to many and varying definitions, depending upon the context in which it is used. Webster's Third New International Dictionary (1967) lists over twenty definitions and subdefinitions. As the term is used in the instant controversy, a school is an institution, maintained at public expense, for instruction in the basic areas of learning. This course of study generally spans a period of twelve years, each year encompassing one class or grade. An individual school ordinarily includes some, but not all, of the twelve grades.

Lang v. Board of Trustees of Joint School District No. 251, 93 Idaho 79, 80, 455 P.2d 856, 857 (1969). For purposes of Article 9, §§ 1, 2, 4 and 5 of the Idaho Constitution, the Idaho Supreme Court has defined the phrase "public schools" as follows:

By section 1 of article 9 of the Constitution guarantees a "system of public, free common schools." There can be no doubt but that the "public, free common schools" here mentioned means the free school system which has been generally adopted in this country, and had specific reference to the district schools throughout the state established for the training and instruction of the youth of the state in the primary and elementary branches of learning.

Pike v. State Board of Land Commissioners, 19 Idaho 268, ___, 113 P. 447, 451 (1911). Neither definition provided by the Idaho Supreme Court is of any assistance in interpreting the definition of a "public virtual school."

The legislature has defined attendance requirements for purposes of the governance of schools by a board of trustees pursuant to Idaho Code § 33-512. There are rules that outline daily attendance minimums and required instructional time. See, IDAPA 08.02.01.250.03.a; 08.02.01.250.05. These attendance rules, which reference teacher-pupil contact, predate the enactment of Chapter 52 of Title 33 and form at least part of the basis for calculation of attendance figures upon which the traditional schools are funded under the Foundation Formula in Chapter 10 of Title 33.

It appears that up until the creation of public virtual schools, the state was able to function in large part by allowing the local school districts to determine what their schools would be. The legislature created teacher-pupil interaction minimums through the mechanism of tying funding to average daily attendance and setting required instructional time. The Idaho Code and the rules are silent as to how attendance is to be determined at a public virtual school, and the code does not tie funding to attendance per se, rather it uses either attendance (which is not defined from a virtual school standpoint) or to percentage of coursework completed, whichever is more advantageous to the virtual school. Idaho Code § 33-5208(8)(b).

Other states have drafted statutes regarding virtual schools and, in doing so, have been more specific about their intent regarding the manner used to provide instruction. For example, Kansas defines a virtual school as "any kindergarten or grades one through 12 course offered for credit that uses distance-learning technologies which predominantly use internet-based methods to deliver instruction and for which the course content is available on an 'anytime, anyplace' basis, but the instruction occurs asynchronously with the teacher and pupil separate locations not necessarily located within a local education agency." K.S.A. §72-6407(p).

Ohio defines its distance learning or internet-based program as follows:

"Internet- or computer-based community school" means a community school established under this chapter in which the enrolled students work primarily from their residences on assignments in nonclassroom-based learning opportunities provided via an internet- or other computer-based instructional method that does not rely on regular classroom instruction or via comprehensive instructional methods that include internet-based, other computer-based, and noncomputer-based learning opportunities.

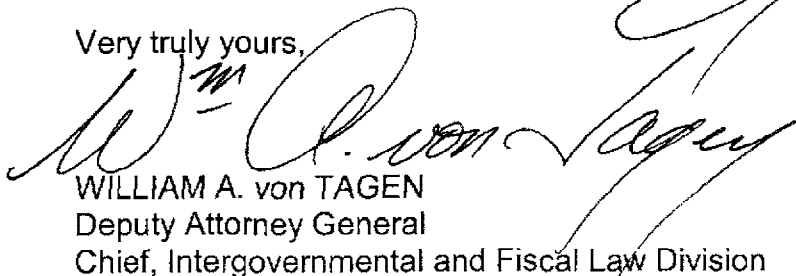
R.C. Ohio § 3314.02(7).

California has a program for "monitoring and evaluating pupil participation in online asynchronous interactive instructional programs conducted over the internet." Cal. Educ. Code § 51705.3. The teacher of the online course must "be online and accessible to the pupil on a daily basis to respond to pupil queries, assign tasks, and dispense information." *Id.* Further, a school offering online courses must "maintain records to verify the time that a pupil spends online and related activities in which a pupil involved," and "maintain records verifying the time the instructor was online."

Until the legislature clarifies key concepts in the definition of a "public virtual school," I cannot provide a reasonable interpretation. I can state that if IDEA is doing little more than assisting parents in purchasing curriculum materials and tracking progress, it is unlikely that a court will find it meets the definition of a public virtual school or of any school to be supported with public funds. If IDEA is, in fact, providing more teacher-pupil contact than indicated, or changes its programs to do so, then another analysis will be necessary based on the specifics of the program. The same applies to any other virtual school. If the legislature does not take action to set clear minimum standards for what constitutes a public virtual school, administrative agencies and the courts will be forced to assess the issue on a case by case basis, looking at the particular facts of the school operation until a judicially determined minimum is established.

This letter is provided to assist you. It represents an informal and unofficial expression of the views of this office based on the research of the author. If I can be of further assistance on this matter, please do not hesitate to contact me.

Very truly yours,



WILLIAM A. von TAGEN
Deputy Attorney General
Chief, Intergovernmental and Fiscal Law Division